

**Delaware Health Resources Board  
Meeting Minutes  
Thursday, June 25, 2015 2:30 PM  
DelDOT Division of Motor Vehicles (DMV)  
Public Safety Building, Conference Room 205  
303 Transportation Circle  
Dover, Delaware 19901**

***Board Members Present:***

Harold Stafford, Acting Chair; David Hollen; Vincent Lobo, MD; William Love; Suzanne Raab-Long; Jill Rogers; Mark Thompson; Yrene Waldron; John Walsh; and Gina Ward.

***Board Members Absent:*** Lynn Fahey; Leighann Hinkle; and Bettina Riveros.

***Staff Present:*** Michelle Amadio; Marlyn Marvel; Rae Mims; and Latoya Wright.

***Call to Order and Welcome:***

Acting Chair, Harold Stafford, welcomed the Board members and called the meeting to order at 2:30 p.m.

***March 26, 2015 Meeting Minutes:***

John Walsh made a motion to approve the March 26, 2015 Delaware Health Resources Board meeting minutes. Bill Love seconded the motion. There was a voice vote, from which Dr. Vincent Lobo, Jill Rogers, Harold Stafford, Mark Thompson, and Yrene Waldron abstained. Motion carried.

***First State Orthopaedics Certificate of Public Review (CPR) Application***

Suzanne Raab-Long and Mark Thompson recused themselves and left the room.

John Walsh presented the Review Committee's findings and recommendation. He stated that First State Orthopaedics wishes to open a freestanding surgery center in Kent County. There were two questions that came up during the Review Committee meetings and the public hearing. One was whether or not the two percent charity care requirement should be revisited in light of the Affordable Care Act. That was a subject of discussion with the Health Resource Management Plan Review Committee. The second question was whether or not the charity care should be restricted only to charity care afforded to citizens of Delaware, as opposed to areas outside the state.

The Review Committee discussed the proposed project's conformity with the following review criteria.

**Criterion I: The relationship of the proposal to the Health Resources Management Plan**

The Review Committee found that the application meets this criterion.

**Criterion II: The need of the population for the proposed project**

The Review Committee found that the application does not meet this criterion with a two to one vote.

Mr. Walsh stated that according to the methodology, using the 2015 population, there is a surplus of eight beds for free standing surgical centers.

Gina Ward asked if First State Orthopaedics would be adding four beds.

Mr. Walsh stated that the application states that they would start with one surgical room and then more would be added as needed up to four. They would be opened up incrementally as the market would bear.

Criterion III: The availability of less costly and/or more effective alternatives to the proposal, including alternatives involving the use of resources located outside the State of Delaware.

The Review Committee found that the application meets this criterion.

Mr. Walsh stated that there is a utilization rate of 38 percent at the Delaware Surgery Center, 29 percent at the Dover Surgicenter and 28 percent at the Bayhealth Outpatient Center. According to testimony at the public hearing, if the utilization rate drops below 30 percent then at least one of those surgical centers will not be able to meet their standing costs. The 38 percent utilization rate at the Delaware Surgery Center involves two physicians who recently joined First State Orthopaedics and do a significant amount of their work at the Delaware Surgery Center. The Review Committee questioned what effect that would have on the new center if it was approved.

With regard to the less costly alternative, for First State Orthopaedics, the average projected income would be \$1,840 per situation. The alternative surgery center, which would be one of the two that are currently in operation, would be \$1,635 for a difference of about \$205. This was discussed at length and the decision of the Review Committee was that the \$205 variation could be explained or negated by the difference in the cost of living between New Castle County and Kent and Sussex County.

Ms. Ward asked what the First State Surgery Center's utilization rate was in Newark. Mr. Walsh stated that it was at capacity. Ms. Waldron stated that may be due to the fact that there are many more people in New Castle County than Kent County.

Ms. Ward questioned whether it was logical to spend the money on a facility in Dover for one bed when the procedure can be done 55 minutes away in Newark unless they are truly at capacity and not able to handle those additional cases.

Mr. Walsh stated that approximately 600 surgical cases per year are done in New Castle County for people who live in Kent County and northern Sussex County.

Ms. Ward stated that those cases would be done in Kent County if the new facility were allowed to open.

Ms. Waldron asked if there was any data provided on how the new Kent County facility would affect the utilization numbers in New Castle County. Mr. Walsh stated that the applicant stated that since their New Castle County facility was at capacity it would have no deleterious effect on the New Castle County facility.

Ms. Waldron stated that they are at capacity because they are having patients come from Kent and Sussex Counties. If those people are able to remain in Kent County it is going to have an impact on the occupancy rate in New Castle County.

Dave Hollen stated that the First State Surgery Center has three offices in Dover, Smyrna and Milford. About 13,000 patients already exist in this area who are going to be using First State Orthopaedics (FSO).

Criterion IV: The relationship of the proposal to the existing health care delivery system.

The Review Committee found that the application meets this criterion.

Criterion V: The immediate and long-term viability of the proposal in terms of the applicant's access to financial, management and other necessary resources.

The Review Committee found that the application meets this criterion.

Criterion VI: The anticipated effect of the proposal on the costs of and charges for health care.

The Review Committee found that the application meets this criterion.

Criterion VII: The anticipated effect of the proposal on the quality of health care.

The Review Committee found that the application meets this criterion.

*Recommendation*

Mr. Walsh stated that by a vote of two to one the Review Committee voted that the application be denied.

*Discussion*

Ms. Ward asked for an explanation of the difference between two tables included in the Certificate of Public Review Report. Table two lists the FSO Insurance Payer Mix for Patients Served 2010-2014 and Table four lists the FSO (Private Physician Practice) Insurance Payer Mix for Patients Served 2010–2014.

Ms. Wright stated that Table four was the private physician practice with two physicians. One of the questions was the number of Medicaid patients increasing in 2014 because of these two physicians. FSO is the physician practice and First State Surgery Center is the outpatient surgery center. Then there is the private physician practice with two physicians.

Mr. Walsh referred to Table five: First State Surgery Center Medicaid Patients Served. The number of Medicaid patients significantly increased in 2014 because of the two physicians who have their practice in Kent County and are joining First State Orthopaedics.

Dr. Lobo stated that he refers about 95 percent of his patients in Harrington to that practice.

Ms. Ward stated that the Medicaid patients currently being served by those two orthopedists at the physician practice will be served by their surgery center if they open a surgery center in Kent County.

Mr. Walsh stated that would be the implication. They are currently being served at one of the other free standing surgery centers which brings up the question of how the current surgery centers will be affected when the new surgery center is built.

Ms. Waldron stated that another issue is that Medicaid no longer has Delaware Physicians Care (DPCI). It now has Highmark and the relationship between Highmark and the provider community is quite different than the relationship between DPCI and the provider community. She thinks the current data is not necessarily going to match one year from now because of

changes in the Medicaid managed care and contracts that have been given to Highmark. That needs to be kept in mind because DPCI and Highmark practice very different models.

Ms. Ward stated that they have a contract with Highmark effective April 1<sup>st</sup> but they are still in negotiations with United.

Mr. Love stated that he is trying to understand the impact on consumers if the project is not approved. If the project is not approved there is existing capacity in other alternative programs in the Dover area. If a person living in Kent County chooses to go to Newark it is more of a choice issue as opposed to there not being an alternative.

Mr. Walsh stated that it is a choice issue according to the testimony at the public hearing of the other two free standing surgical centers that offered privileges to the physicians at First State Orthopaedics.

Mr. Love asked if a person who is currently getting a needed service in Newark can currently get that service in Dover.

Mr. Walsh stated that there are other facilities in Dover. All of the facilities are within less than two miles of each other and they provide the same service. One of the comments made at a presentation was that First State Orthopaedics surgeons felt more comfortable with their model, rather than the other two free standing facilities.

David Hollen gave a presentation on criterion two: the need of the population for the proposed project. He stated that the Review Committee agreed on six of the seven criteria. They did not agree on criterion two.

Everyone agrees that the Health Resources Management Plan (HRMP) is outdated and uses old census data. The data indicates that there will be triple digit increases in certain age categories of the elderly population. With a shift to outpatient care this data implies a foreseen need for that population.

The HRMP states that the need for a free standing surgery center shall be considered by evaluating the projected need and comparing the projected need with the existing supply of rooms. The HRMP also specifically states that the Board recognizes that there are other factors and a mathematical formula to establish need. The future census data and the fact that there are already 13,000 First State Orthopaedics patients in the state shows that there is a need for it.

Using the data, Mr. Hollen projected a more realistic future census count. The data they were providing was from 2010 to 2013. It is currently 2015 and, if the project is approved, by the time they finish construction and start taking patients it will be 2017. Mr. Hollen used the 4.5 percent that they were using for their projected population increases and projected through 2019. In 2015, 15.39 beds are needed. The projected bed need for 2017 is 16.81, and by 2019 it will be equal to the number of beds they currently have.

Mr. Hollen stated that he does not understand why the number of Blue Hen Surgery Center beds is being taken into consideration because they do not perform the type of surgery that First State Orthopaedics provides.

Mr. Hollen believes there is a need for the new surgery center. He also believes that there is a population in southern New Castle County that will use the surgery center if it is allowed to open.

The HRMP specifically states that the Board can forward think and look at projected need. It also says that the Board can base its decision on things other than methodology and bed count.

### *Discussion*

Dr. Vincent Lobo stated that First State Orthopaedics was not able to come to agreement with Bayhealth to be able to have call coverage. Call coverage is important. Also they could not call physicians at Christiana Care. They could not come down to cover any problem. Dr. Lobo raised a concern regarding patients needing care in their office and the physicians at Christiana Care are not available. The two First State Orthopaedic physicians are not available.

Mr. Walsh stated that the Review Committee asked this question. The response was that there would be a nurse anesthetist at the practice. There would also be an anesthesiologist on call physically close to Kent General Hospital in the event there was an issue, the person could be taken to the hospital.

Ms. Ward stated that this is a specialty surgery center, specializing in orthopaedics. She asked if it will affect the other surgery centers if Kent County residents no longer have to travel to Newark for outpatient orthopaedic surgery. She also asked if First State Orthopaedics take their fair share of the Medicaid patient population. She asked if it is a payer concern that the better paying commercial insurance patients will now use First State Orthopaedics, rather than one of the other surgery centers.

Mr. Stafford asked if there is any type of breakdown on the existing surgicenters and how many orthopaedic cases they serve.

Ms. Wright stated that the staff did a survey of all of the surgery centers in the state of Delaware and she can share the information with the Board.

Mr. Stafford asked what time period the survey covered. Ms. Wright stated that it was a five year time frame.

Mr. Stafford stated that he was advised by Counsel that the Board could allow a short statement from First State Orthopaedics before they vote.

Ray Krett stated that he was the Administrator of Surgical Services for First State Orthopaedics and Administrator of First State Surgery Center, which is the Newark center that is referred to in the reports. First State Orthopaedics has been in Kent County for quite a long time. They currently have seven physicians in the Smyrna, Dover and Milford area covering five days per week. Not every physician is in Kent County five days per week, but there is five day week coverage. Dr. Tooze and Dr. Manifold made a conscious decision at the beginning of last year to align themselves with First State Orthopaedics and they are seeing First State Orthopaedics patients.

With regard to call coverage in Kent County, since Christiana Care is a level one center First State Orthopaedics physicians have to take call there. They are not allowed to take call at another center because they must be on call for the primary center. That is one of the reasons

why Dr. Tooze and Dr. Manifold are so important to Kent County because they are already on staff at Bayhealth and take call.

First State Orthopaedics is in the process of recruiting three new physicians. In August Dr. Michael Axe's son, Dr. Jeremy Axe, is joining the practice as a new orthopaedic physician. At least 50 percent of his practice will be in the Dover area and he will take call at Bayhealth.

First State Orthopaedics fully recognized that when Dr. Tooze and Dr. Manifold joined the practice that their payer mix was going to shift. They took that into consideration when they decided to move forward with this project. In the past they have not seen a lot of Medicare patients in New Castle County. They have been working hard and were diligent enough to get an agreement with Highmark. They have reached out to United and were told that their panel was closed.

They realize that the facility that they want to build in Kent County is going to see a fair amount of Medicaid patients. They are willing and committed to do that. That is why Dr. Tooze and Dr. Manifold joined them.

They just spent some additional funds upgrading the Smyrna facility to handle the anticipated patient load. They agree with the fact that Kent and Sussex County are growing. They are here and they want to treat those patients. They also want to be able to give them the choice to come to see First State Orthopaedics physicians. Already 13,000 patients have decided to use First State Orthopaedics. Dr. Lobo makes a conscious decision to refer his patients to Dr. Tooze and Dr. Manifold who are part of First State Orthopaedics. People are making a conscious decision to use First State Orthopaedics and they want to be able to allow them to have their surgeries closer to home and bring those services to Kent County.

Ms. Waldron stated that, while the intent is to serve Medicaid patients, they will not be served unless First State Orthopaedics reaches an agreement with the two Medicaid managed care organizations that Delaware currently has, which are Highmark and United. They have Highmark but they do not have United.

Mr. Krett stated that they were told by United that their panel was closed. They reached out to them and can provide documentation of the email that they received stating that they are closed.

Ms. Waldron stated that the number of Medicaid patients they are going to be able to serve will be limited to the Medicaid clients under Highmark.

Mr. Krett stated that Dr. Tooze and Dr. Manifold see a fair amount of Medicaid patients and will continue to do so.

#### *Action*

The Board voted on the recommendation of the Review Committee to deny the First State Orthopaedics Certificate of Public Review application. The vote was five in favor, two opposed and one abstention. The recommendation was approved by the Board.

Suzanne Raab-Long and Mark Thompsons rejoined the meeting.

#### *Updates*

### Genesis-Eden Hill Decision

The Superior Court has rendered the decision in the matter of Genesis Healthcare versus the Delaware Health Resources Board. The Court affirms the decision of the Board. Genesis has appealed Judge Brady's ruling to the Delaware Supreme Court; however this does not limit Eden Hill to proceed with their CPR project to construct a skilled nursing facility in Dover DE.

### Genesis-Franciscan Care Center Acquisition CPR Progress Status Update

The Board granted a CPR approval to Genesis Healthcare on June 24, 2014 to purchase Franciscan Care Center. A bill of sale was executed on August 1, 2014. The Genesis progress status letter was distributed to the Board members for their review.

### Nanticoke Health Services Notice of Intent (NOI)

The staff received a NOI from Nanticoke to purchase Seaford Specialty Surgery Center, LLC. Upon review and in accordance with 16 Del Code §9304, it was determined that the NOI did not meet the criteria for a CPR to include:

- 1) The construction, development, or establishment of a health care facility or the acquisition of a nonprofit care facility.
- 2) Any expenditure by or on behalf of a health care facility, not including a medical office building, in excess of \$5.8 million, which is considered a capital expenditure. Expenditures in excess of \$5.8 million may be exempt from review if they are necessary to maintain the physical structure of a facility and are not directly related to patient care.
- 3) A change in bed capacity of a health care facility which increases the total number of beds (distributes beds among various categories, or relocates such beds from one physical facility or site to another) by more than 10 beds or is more than 10% of total licensed bed capacity, whichever is less, over a 2-year period.
- 4) The acquisition of major medical equipment; does not include the replacement of major medical equipment nor major equipment acquired by a business or industrial establishment for a dispensary or first aid station, for use by students, employees of a school or university or inmates and employees of a prison.

### FOIA Requests (MeadowWood and Dover Behavioral Health)

The staff received Freedom of Information Act (FOIA) requests for MeadowWood and Dover Behavioral CPR applications and is processing them accordingly. The MeadowWood CPR application was granted in 2011 for the approval of a 20 bed expansion. Dover Behavioral Health was also granted a CPR approval in 2011 for a 16 bed expansion in their facility.

### ***Upcoming Items Before the Board***

#### Revised NOI for Christiana Care Women's Center

A revised NOI was submitted by Christiana Care Women's Center to reflect a new capital expenditure (from \$250 million to \$258 million) on May 4, 2015. It addresses chronic facility issues in the Women and Children's services. The staff anticipates receiving the CPR application by late summer.

#### NOI/Full CPR Application – Sun Behavioral Health

Sun Behavioral Health (based out of New Jersey) submitted a NOI on May 15, 2015 to establish a 90 bed freestanding psychiatric hospital and outpatient services in Georgetown (Sussex County), DE. The full application was received on June 23, 2015. Staff is currently reviewing the application for completeness.

The application must be deemed complete or incomplete by July 15, 2015. Public notice shall be posted in the newspapers by July 22, 2015. A decision must be made by October 20, 2015 if a public hearing is not requested. A decision must be made by November 19, 2015 if a public hearing is requested.

Mr. Stafford asked for volunteers to serve on a Review Committee for the Sun Behavioral Health application. John Walsh and Bill Love volunteered to serve on the Review Committee. The staff will poll the Board members who were absent from the meeting to see if one of them would be willing to serve on the Review Committee.

#### NOI Post-Acute Medical, LLC

Post Acute Medical (based out of Pennsylvania) submitted a NOI on June 4, 2015 to establish a freestanding inpatient rehabilitation facility in Dover, DE. The Health Resources Board staff spoke with the applicant on June 19, 2015 to discuss the CPR process in Delaware. The staff anticipates receiving the application soon.

Prior to the discussion with them on June 19, 2015, Post-Acute Medical requested FOIA information for the HealthSouth's CPR decision, follow-up questions and responses.

#### ***Other Business***

There was an opportunity for other business and there was none.

#### ***Public Comment***

There was an opportunity for public comment and there was none.

#### ***Next Meeting***

The next Health Resources Board meeting will be held in the Farmington/Felton Conference Rooms on the first floor of the Department of Transportation Administration Building, 800 Bay Road, Dover on Thursday, July 23, 2015 at 2:30 p.m.

#### ***Adjourn***

The meeting adjourned at 4:00 p.m.



***Guests Attending***

Jennifer Anderson  
Michelle Clark  
Charles Constant  
James Gallagher  
Kristy Hull  
Ray Krett, Jr.  
Joseph T. Laws  
Jeff Lord  
Robert MacLeish  
William Mason  
John McKenna  
Sam Noel  
Judy Pappenhagen  
Joseph Richichi

Delaware Surgery Center  
Bayhealth Medical Center  
DBHS  
Morris James, LLP  
Delaware Surgical Center  
First State Orthopaedics  
ATI Physical Therapy  
First State Orthopaedics  
Lighthouse Construction, Inc.  
MeadowWood Behavioral Health System  
Rockford Center  
Carpenters Rep 626  
Christiana Care  
Dover Surgicenter